No. 89-390

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Where the Pension Benefit Guaranty Corporation ("PBGC") is broadly authorized to restore terminated pension plans "in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under [ERISA]," 29 U.S.C. § 1347, may a reviewing court foreclose the agency from considering whether restoration is appropriate to remedy abuse of the federal pension insurance program?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances?

3. May a reviewing court vacate a restoration decision under 29 U.S.C. § 1347 because PBGC focused "inordinately" on ERISA and failed to defer to selected policies underlying the bankruptcy and labor laws?

4. When an agency undertakes informal adjudication under a statute that sets forth no procedural requirements for exercise of its authority, may a reviewing court substitute its judgment for the agency's as to the appropriate procedures to be followed?

LIST OF PARTIES

The caption contains the names of all the parties to the proceedings in the court of appeals. Petitioner, the Pension Benefit Guaranty Corporation, is a wholly-owned United States government corporation that has no subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F.2d 1008, and is reprinted at pages 1a-27a of the Appendix to PBGC's petition for a writ of certiorari ("Pet. App.").[1] The judgment of the United States District Court for the Southern District of New York dated September 13, 1988, from which appeal was taken, and the district court's

[1] The Appendix to the petition was bound in a separate volume.

opinion of June 22, 1988, reported at 87 Bankr. 779, are reprinted at Pet. App. 132a and 28a-131a, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on May 12, 1989. Pet. App. 1a. On August 1, 1989, Justice Marshall granted an extension of time within which to file a petition for a writ of certiorari until and including September 10, 1989, which was a Sunday. PBGC timely filed its petition on September 11, 1989. This Court granted the writ on October 30, 1989.

STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, which are set forth at Pet. App. 133a-157a.[2]

STATEMENT OF THE CASE

Statutory Background

The Pension Benefit Guaranty Corporation is a wholly-owned United States government corporation, 29 U.S.C. § 1302, modeled after the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen). The Board of Directors of the PBGC consists of the Secretaries of Labor, Treasury and Commerce. 29 U.S.C. § 1302(d). The PBGC has independent litigating authority. 29 U.S.C. § 1302(b)(1).

[2] ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) ("SEPPAA"), and again in 1987 by the Pension Protection Act, Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987) ("PPA"). Because the PPA amendments do not apply in this case, citations in this brief are to ERISA as amended by SEPPAA, as found in 29 U.S.C. (1982 and Supp. IV 1986), unless otherwise noted.

The PBGC administers and enforces Title IV of ERISA (29 U.S.C. §§ 1301-1461), which includes a mandatory government insurance program that protects the pension benefits of over 30 million American workers in the private sector. Congress perceived a need for such pension insurance in order "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (quoting 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)).

Pension insurance is funded primarily by statutorily-mandated premiums from employers who maintain pension plans covered by Title IV. 29 U.S.C. §§ 1306, 1307.[3] The insurance program is also financed by the statutory liability imposed on employers who terminate underfunded pension plans. Upon termination, the employer becomes liable to the PBGC, generally for 75 percent of the difference between the plan's assets and the benefits insured by PBGC. *See* 29 U.S.C. § 1362(b). However, because PBGC historically has recovered only a small portion of that liability, Congress repeatedly has been forced to increase the annual premiums.[4] Despite these increases,

[3] Title IV covers virtually all "defined benefit" pension plans sponsored by private employers. *See* 29 U.S.C. § 1321. A defined benefit pension plan is one that promises to pay employees, when they retire, a fixed benefit under a formula that takes into account such factors as final salary and years of service with the employer. It is distinguished from a "defined contribution" plan (also known as an "individual account" plan), under which the employer typically contributes a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. *See* 29 U.S.C. § 1002(34) and (35). Federal insurance does not cover defined contribution plans because employees are not promised any particular level of benefits, only that they will receive the balance in their individual accounts.

[4] When the PBGC was established in 1974, premiums were fixed at a flat annual rate of $1.00 per participant. The rate was raised in 1978 to $2.60, and in 1986 to $8.50. In the 1987 Pension Protection Act, a variable-rate premium was established, ranging from

PBGC reported liabilities of $4 billion and assets of only $2.4 billion in its fiscal year 1988 Annual Report, leaving a deficit in its insurance fund of more than $1.5 billion, exclusive of the more than $2 billion of liabilities at issue in this case. PBGC estimates that the ongoing pension plans it insures currently contain more than $16 billion of additional unfunded liabilities, over half of which is concentrated in the plans of only 7 companies.[5]

Title IV insurance may be paid only when a covered plan terminates. *See* 29 U.S.C. § 1322(a) (PBGC shall guarantee the payment of nonforfeitable benefits under a single-employer plan "which terminates"); § 1361 (PBGC shall pay benefits under a single-employer plan "terminated" under Title IV of ERISA). Termination is thus the insurable event under Title IV's single-employer program.

$16 to $50 per participant. (For citations, see PBGC certiorari petition at 4 n.4.)

[5] A pension plan may have insufficient assets to pay benefits even when statutory funding standards are met. Title I of ERISA requires employers to make "minimum funding" contributions to defined benefit pension plans each year. *See* 29 U.S.C. § 1082. The Internal Revenue Code imposes a parallel requirement as a condition to achieving favorable tax treatment. *See* 26 U.S.C. § 412. But neither requires all benefits earned to be funded immediately and fully. Rather, based on actuarial projections, an employer is entitled to amortize its funding liability over a period of years. When a new plan is established, for example, past service of employees may be credited and the liability amortized over 30 years. 29 U.S.C. § 1082(b)(2); 26 U.S.C. § 412(b)(2). Similarly, an increase in benefits, or an unexpected excess of benefit liabilities over actuarial projections, may be amortized over a period of years. *Id.* This can occur, for example, when financial difficulties cause the layoff of large numbers of employees who then commence receipt of their pensions far earlier than anticipated. Thus, a plan may be underfunded either because contributions have not been made, because the plan's payout of benefits has exceeded actuarial projections, or because new or past service liabilities have not been fully amortized.

Under the statute, plans may be terminated "voluntarily" by an employer or "involuntarily" by the PBGC. A plan may terminate voluntarily in a "standard" termination only if it has sufficient assets to pay all benefit commitments. 29 U.S.C. § 1341(b). If the plan's assets are insufficient to pay all benefits, the employer must demonstrate that it is in financial "distress," as defined in 29 U.S.C. § 1341(c). Neither standard nor distress terminations are permitted if termination would violate the terms of an existing collective bargaining agreement. 29 U.S.C. § 1341(a)(3).

A collective bargaining agreement does not bar an involuntary termination by the PBGC under 29 U.S.C. § 1342. *See* 29 U.S.C. § 1341(a)(3). The PBGC initiates an involuntary termination to protect the pension insurance program. Thus, the PBGC may initiate termination if it determines, for example, that a plan has not met ERISA's minimum funding standards, or that the risk to the insurance program may increase unreasonably if the plan is not terminated. 29 U.S.C. § 1342(a).

When an underfunded plan terminates, the PBGC becomes trustee of the plan and takes over the plan's assets and liabilities. The PBGC uses the plan's assets to pay as much of the benefits as they will cover. *See* 29 U.S.C. § 1344. The PBGC must then add its own funds to ensure payment—up to specified limits—of all remaining "nonforfeitable" benefits, *i.e.*, those benefits to which participants have earned entitlement under the terms of the plan or ERISA as of the date of termination. 29 U.S.C. §§ 1301(a)(8), 1322(a)-(b).

ERISA limits the benefits PBGC may guarantee upon plan termination. Retired participants cease receiving benefits in excess of the amounts insured by PBGC.[6]

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[6] For plans terminating in 1987 (the year relevant here), the maximum monthly benefit PBGC may pay is $1,857.95. *See* 29 C.F.R. § 2621, Appendix A (1988); 29 U.S.C. § 1322(b)(3) ($750

Active plan participants (current employees) cease to earn additional pension benefits under the plan and lose entitlement to most benefits not yet fully earned on the date of plan termination. *See* 29 U.S.C. §§ 1322(a)-(b), 1301(a)(8); 29 C.F.R. § 2613.6 (1988).

Termination can be undone. Under section 4047 of ERISA, the PBGC has authority to reinstate a plan that is "in the process of being terminated" or that "has been terminated." 29 U.S.C. § 1347. Section 4047 provides:

> Whenever the corporation [*i.e.*, the PBGC] determines that a plan which is to be terminated under section 4041 or 4042, or which is in the process of being terminated under section 4041 or 4042, under this subtitle should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 4041 or 4042. In the case of a plan which has been terminated under section 4041 or 4042, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title [*i.e.*, Title IV of ERISA], to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

Id. Thus, section 4047 authorizes the PBGC "to take such action as may be necessary to restore [a terminated] plan to its pre-termination status" if "the [PBGC] determines such action to be appropriate and consistent with its

in 1974 dollars, adjusted for inflation). The maximum is lower if the participant retires before age 65 or has a spouse entitled to survivor benefits. *See id.*; 29 C.F.R. § 2621.4(c)-(e).

duties under [Title IV of ERISA]." *Id.* When a plan is restored, full plan benefits are reinstated, and the employer, rather than the PBGC, is again responsible for the plan's unfunded liabilities.

The PBGC has determined that restoration is "appropriate and consistent with its [Title IV] duties" where, after an underfunded pension plan is terminated and its liabilities are shifted to the PBGC, the employer establishes "follow-on plans." Follow-on plans are new benefit arrangements designed to wrap around PBGC insurance payments in such a way as to provide both retirees and active participants substantially the same benefits as if no termination had occurred. *See* AR 194, JA 229.[7] They effectively continue the plan and make up the benefits that PBGC does not insure. Retired employees receive most or all of their non-guaranteed benefits. Active employees are able to combine service under the old plan with service under the new plan to earn additional benefits based on total years of service. This results in PBGC subsidizing an employer's ongoing pension program.[8]

The PBGC has determined that such follow-on pension arrangements abuse the pension insurance program. As the PBGC stated when the follow-on plan issue first arose in 1981, "If PBGC guarantees were to be paid under such

[7] The designation "AR" refers to the 1,592-page administrative record of the PBGC's restoration decision, excerpts from which are included at Pet. App. 159a-182a and in the Joint Appendix ("JA") filed with this brief. The entire administrative record is contained in exhibits to the joint appendix filed in the court of appeals, with the original pagination retained. Hereinafter, citations to AR are given only for items that are not in the present Joint Appendix.

[8] The PBGC does not object to all post-termination pension arrangements—it objects only to those that result in its insurance funds being used as a subsidy for an ongoing pension program. For example, the agency has never objected to employees earning new pension benefits based solely on their post-termination service. *See* JA 228-30.

circumstances," then any company with substantial unfunded pension liabilities "could find it advantageous to establish similar arrangements to secure PBGC's payment of the major portion of its costs of an ongoing retirement program." Pet. App. 168a. Accordingly, PBGC concluded in that case and two other cases involving different employers that the establishment of abusive follow-on plans would negate or preclude the termination of the pension plans at issue.[9] PBGC also warned that to prevent such follow-on plan abuse, the agency would "exercise its authority under Section 4047 of ERISA to restore . . . the previously terminated plans." Pet. App. 178a.

Facts and Proceedings

This case arose after The LTV Corporation ("LTV Corp.") and many of its subsidiaries, including LTV Steel Company, Inc. ("LTV Steel") (collectively "LTV") filed Chapter 11 petitions for reorganization in the United States Bankruptcy Court for the Southern District of New York in July 1986. Pet. App. 6a-7a. LTV Steel had sponsored three defined benefit pension plans (the "Plans"), two of which had been negotiated in collective bargaining with the United Steelworkers of America ("USWA" or "union"). The third plan was for non-union, salaried employees. Historically underfunded, the Plans had, by late 1986, total unfunded liabilities for promised benefits of almost $2.3 billion. *See* JA 138. Approximately $2.1 billion was covered by PBGC insurance. *See id.*

[9] PBGC Opinion Letter 81-11, Pens. Rep. (BNA) No. 367 at R-3 (May 11, 1981), LEXIS, Labor Library, PBGC file (Pet. App. 159a); PBGC Opinion Letter (unpublished) (April 24, 1981) (Pet. App. 165a); PBGC Opinion Letter 86-27, 14 Pens. Rep. (BNA) No. 10 at 306 (Dec. 17, 1986), LEXIS, Labor library, PBGC file (Pet. App. 172a).

As the district court stated, "LTV readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. This could happen only if the Plans were terminated, with the PBGC assuming responsibility for the unfunded liabilities, and new pension arrangements could be negotiated. LTV, however, could not terminate the Plans voluntarily because the USWA objected to termination. *See* JA 241-42; 29 U.S.C. § 1341(a)(3).

In December 1986, LTV advised the PBGC that the company could not and would not fund the Plans. JA 126. PBGC's internal working group estimated that, without further funding, the Plans' $2.1 billion underfunding would increase by $65 million by December 1987 and by another $63 million by December 1988, unless the Plans were immediately terminated. JA 138. Moreover, extensive plant shutdowns were projected which—if they occurred before the Plans terminated—would have required the payment of "shutdown benefits."[10] PBGC estimated that such benefits could increase the Plans' liabilities by as much as $300 to $700 million, up to $500 million of which would be covered by PBGC insurance. JA 138. Consequently, the PBGC decided to terminate the Plans to protect the insurance program from the unreasonable risk of large losses. *See* JA 140; AR 1257, 1384, 1507; 29 U.S.C. § 1342(a).

The PBGC accordingly commenced termination proceedings in the United States District Court for the Southern District of New York, pursuant to 29 U.S.C.

[10] Under the Plans, a plant shutdown makes certain participants eligible for "shutdown benefits," accelerating their entitlement to a pension, with no reduction in the amount of that pension to reflect the earlier benefit commencement date. Shutdown benefits are insured if the shutdown occurs before termination, but not if it occurs after. *See* 29 U.S.C. §§ 1301(a)(8), 1322(a); 29 C.F.R. § 2613.5-.6 (1988).

§ 1342. With LTV's consent, the Plans were terminated effective January 13, 1987. JA 141-42; AR 1536-41. Upholding the terminations against a USWA challenge, the Court of Appeals for the Second Circuit explicitly noted that PBGC could restore the Plans if subsequent events warranted it. *Jones & Laughlin Hourly Pension Plan v. The LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987).

Because Plan participants lost benefits as a result of the termination, the USWA filed an action against LTV in the bankruptcy court, challenging the terminations and seeking to have LTV make up the lost benefits. *See* Pet. App. 43a. In settlement of that action, LTV Steel and the union negotiated an interim collective bargaining agreement that included follow-on plans specifically designed to continue service under the terminated Plans and to make up benefits lost under those Plans. *See* JA 156, 158-61. Participants were thereby placed in virtually the same position they would have been in if the old Plans had never terminated. JA 156-60, 289-93. For example, payments to retirees were explicitly calculated as "a percentage of the difference between the benefit that was being paid under the Prior Plans and the amount paid by the PBGC." JA 181. Thus, as the union advised its members:

> • Those retirees who are receiving $550 or more per month from the PBGC will recover 90 percent of their losses.
>
> • Those retirees who are receiving between $400 and $549 per month will recover 95 percent.
>
> • Those retirees receiving less than $400 will receive 100 percent restoration.

USWA Summary of Proposed Agreement between USWA and LTV Steel, JA 289.

Similarly, follow-on benefits for active participants were expressly designed to replace benefits under the old

Plans that were not insured by PBGC, such as certain early retirement benefits and shutdown benefits based on plant closings that might occur after termination of the old Plans. As LTV stated in the bankruptcy court, the follow-on plans "provide[] for benefits in the event of future shutdowns of LTV Steel plants. The benefits will total 75% of benefits lost as a result of plan termination." JA 159. The 75 percent was supplemented by other follow-on benefits so that, in some cases, the follow-on plans provided more than 100 percent of lost benefits. JA 235.[11]

As soon as these new benefit arrangements were first tentatively negotiated in May 1987, the PBGC advised LTV that they violated the PBGC's longstanding policy against abusive follow-on plans. JA 230. Thereafter, PBGC representatives had a series of meetings with LTV and union representatives to discuss PBGC's objections. JA 262, 348. In these meetings, PBGC also advised the parties of alternative arrangements that would be satisfactory to PBGC. JA 262-67.

LTV and the USWA rejected PBGC's advice, however, and LTV asked the bankruptcy court for permission to fund the follow-on plans. JA 150. The bankruptcy court granted LTV's request. JA 261; AR 1554-56. In doing so, the bankruptcy court noted that PBGC "may have legal options or avenues that it can assert administratively . . . to implement its policy goals. Nothing done here tonight precludes the PBGC from pursuing these options . . . ." JA 261.

By August 1987, each of the financial factors on which the PBGC had relied in terminating the Plans had changed significantly. The steel industry, including LTV Steel, was experiencing a dramatic financial turnaround,

[11] For its salaried employees and retirees, LTV established follow-on plans that were "comparable in every respect" to the follow-on plans negotiated with the union. AR 508.

contrary to the predictions of experts in late 1986. *See* JA 314-15. Information LTV submitted to its creditors indicated that LTV had substantially exceeded its business projections of operating income. *See* JA 344. Consistent with this turnaround, and contradicting LTV's earlier claim that it could not and would not fund the Plans, LTV had sought and obtained bankruptcy court approval to fund the new follow-on plans at a cost of at least $90 million per year. JA 261, 315; AR 1554-56.[12] It also had obtained bankruptcy court approval to contribute another $90 million in cash and stock to a previously established Employee Investment Program. JA 317; AR 1545-53. These amounts combined were approximately the same as LTV's annual minimum funding contribution for pre-termination years, and were not significantly less than the amount LTV would have to contribute to the Plans in 1987 (for plan years 1984-86) if the Plans were restored. *See* JA 317.

Finally, an LTV official had testified in the bankruptcy court that, with only one exception, none of LTV Steel's plants would be shut down in the next several years. JA 255-56. The PBGC therefore no longer faced the imminent risk, central to its decision to terminate the Plans, of huge additional unfunded liabilities for guaranteed shutdown benefits.

In August 1987, PBGC's internal working group commenced a series of meetings to consider information obtained from LTV bearing on its changed financial outlook and the abusive follow-on plans. The PBGC reviewed LTV's bankruptcy court testimony about the shutdowns (JA 255-56, 316), and the papers, including the follow-on plans, that LTV filed in support of its application to the bankruptcy court to approve funding for those

[12] This amount alone (in the absence of additional shutdown liabilities) would have prevented the immediate "deterioration of the financial condition" of the Plans, 29 U.S.C. § 1342(c), with which PBGC was concerned when it terminated them. *See* JA 138.

plans. JA 150-222, 314-15. The PBGC also reviewed LTV's own financial data and analyses provided to the SEC in its Forms 10-K and 10-Q (AR 671-1084), and compared that actual data to the projections set forth in LTV's 1987-88 Operating Plan (JA 6-120). JA 344.[13] In addition, the PBGC reviewed a report of LTV's Creditors' Committee, which was also based on data provided by LTV. AR 15-98; JA 317. Finally, the working group reviewed the report of PBGC's financial analyst, which concluded on the basis of the foregoing information that LTV could now afford to fund the Plans, at least for "the immediate future." JA 345, 317-18.

PBGC's internal working group recommended that the agency's Executive Director restore the Plans. JA 318-20. The Executive Director then consulted PBGC's Board of Directors. The Board discussed the facts of the LTV case and reviewed its longstanding opposition to abusive follow-on plans. Pet. App. 180a-81a. It then unanimously affirmed the authority of the Executive Director to determine when particular plans should be restored. *Id.*

Before making a decision, the Executive Director reviewed all of the materials in the Administrative Record, including a series of letters between her principal deputy and LTV officials in which restoration was discussed. *See* JA 330-39. She also reviewed the results of meetings between LTV and PBGC representatives that she had initiated to elicit "any additional information [LTV] might wish to supply" concerning a decision to restore the Plans. JA 348; *see* JA 356-57, 360-61.

[13] That Operating Plan, released in December of 1986, was the source of much of the financial information that PBGC had relied on in terminating the Plans. JA 6-120. At the time of termination, however, PBGC believed the Operating Plan's projections to be "optimistic." JA 129. The later SEC filings demonstrate that the projections were instead pessimistic, and that LTV's actual results had dramatically exceeded its projections. *See* JA 344.

On September 22, 1987, the Executive Director issued a Notice of Restoration, returning the Plans to their pre-termination status. Pet. App. 182a. Her decision was based on LTV's establishment of the abusive follow-on plans, its financial improvement, and its willingness to fund new pension arrangements. *Id.* Restoration meant that the Plans were ongoing and that LTV was again responsible for administering and funding them.

When LTV refused to comply with the restoration, the PBGC brought an enforcement action in the United States District Court for the Southern District of New York in October 1987. Pet. App. 51a-52a. Meanwhile, LTV filed an action in the bankruptcy court alleging that the restoration violated the "automatic stay" provision of the Bankruptcy Code, 11 U.S.C. § 362(a). Pet. App. 34a. In a decision reported at 86 Bankr. 33, the district court withdrew this action from the bankruptcy court pursuant to the PBGC's motion under 28 U.S.C. § 157(d), and considered both actions together. Pet. App. 34a.

The Decision of the District Court

The district court held that restoration did not violate the automatic stay in bankruptcy, and was, in any event, a governmental regulatory action exempted from the automatic stay by 11 U.S.C. § 362(b)(4). But, the district court concluded, PBGC's restoration decision was unlawful.

The district court conceded that "Section 4047 contains little in the way of restrictive language." Pet. App. 85a. It nevertheless held that restoration could not be based on an employer's establishment of follow-on plans. This was because "[t]he legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified only improvements in the financial condition of the plan and its sponsors as possible grounds for restoration." Pet. App. 93a-94a. The district court found additional support for its conclusion in the fact that Congress,

in amending ERISA in 1987, did not enact a proposal that would have precluded employers from establishing follow-on plans. Pet. App. 97a-99a.

The district court further held that "the Record does not support a finding that the PBGC's determination that the [follow-on plans] were abusive represents a reasonable accommodation of conflicting policies within Title IV and between Title IV and other non-ERISA laws." Pet. App. 100a. In the district court's view, the opinion letters setting forth PBGC's policy against abusive follow-on plans (Pet. App. 159a-179a) were irrelevant because the terminations addressed in them were "voluntary," rather than "involuntary" as in this case. Pet. App. 100a-101a. Finally, although it was "not disputed that one of the USWA's primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" or that the new plans "substantially achieved that goal," Pet. App. 109a, the district court concluded that the record was insufficient to show that LTV's follow-on plans effectively continued the old Plans. Pet. App. 107a-109a.

The district court also held that the administrative record did not support restoration for financial improvement. In the district court's view, restoration is appropriate only where the PBGC demonstrates an employer's ability to fund its plans over the long term.

The district court did find that the PBGC "acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding." Pet. App. 124a. It concluded, however, that the PBGC failed "to set forth those standards with sufficient clarity to permit LTV to challenge them," Pet. App. 125a, and that the PBGC's procedures were therefore inadequate.

The Decision of the Court of Appeals

The court of appeals affirmed the district court's decision in all relevant respects. The court of appeals agreed with the district court that restoration is a governmental regulatory action, exempt from the automatic bankruptcy stay pursuant to 11 U.S.C. § 362(b)(4). Pet. App. 24a. The court held, however, that the PBGC's decision to restore the Plans was "arbitrary and capricious" because the PBGC "focused inordinately on ERISA" and failed to honor the "policies and goals" of other laws. Pet. App. 17a. In the court's words, "Although this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." Pet. App. 16a.

The court also held that the PBGC lacks statutory authority to restore pension plans on the basis of follow-on abuse because "[t]he legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

Although the court agreed with the PBGC that "improvement in financial circumstances is a basis for restoration," Pet. App. 21a, it rejected the PBGC's determination that LTV's financial improvement warranted restoration. The court held that restoration for improved financial circumstances may be based only on "the long term ability of LTV to fund the Plans." Pet. App. 24a. Here, the court decided, "LTV's apparent ability to fund the Plans suffers" because "any claims arising out of LTV's obligation to pay into the pension fund plans are pre-petition debts" that cannot be paid except in a proportional distribution with other general unsecured creditors pursuant to a plan of reorganization. Pet. App. 23a-24a.

Finally, the court held that the PBGC's decision, which was reached through informal adjudication, was arbitrary and capricious because the agency's procedures were inadequate. Pet. App. 26a.

Accordingly, the court affirmed the judgment of the district court and remanded the case to the PBGC. Pet. App. 27a.

SUMMARY OF ARGUMENT

1. PBGC acted within its authority when it restored the LTV Plans as a remedy for the establishment of abusive follow-on plans. Section 4047 of ERISA authorizes restoration in any case "in which the corporation determines such action to be appropriate and consistent with its duties under [Title IV]." Thus, the statute not only establishes a flexible standard, but explicitly delegates to the PBGC the role of determining when it is satisfied. Given the sweep of that statutory delegation, resort to the legislative history is unnecessary.

In any event, that history confirms the breadth of PBGC's powers under this provision. In both the statute and its history, Congress expressed its desire that pension plans continue rather than terminate, a preference which is served whenever a plan is restored. The Conference Committee indicated that restoration could take place not only for changed financial circumstances, but when PBGC determined that "some other factor made termination no longer advisable." Recognizing that clever employers could take advantage of the federal insurance program, Congress imposed statutory limits on the benefits guaranteed, and granted the PBGC broad authority to restore terminated plans when necessary to block abuse.

The court of appeals restricted PBGC's authority by an egregious misuse of legislative history. It reduced PBGC's restoration authority to one example made explicit in the Conference Report, thereby ignoring other expressions of congressional intent and effectively nullifying the broad statutory language. An inference based upon a purported omission in the legislative history cannot be the basis for restricting express statutory language. *See Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980).

The court of appeals also used Congress's failure in 1987 to pass a more sweeping prohibition on replacement plans as evidence of its intent in 1974 with respect to section 4047. Such subsequent legislative history—and particularly such highly ambiguous inaction—"has no persuasive significance." *United States v. Wise*, 370 U.S. 405, 411 (1962). It is equally, if not more, plausible that Congress approved of PBGC's use of its authority under section 4047 when, after the restoration in this case, it extensively amended Title IV of ERISA but did not limit PBGC's restoration powers.

The PBGC's interpretation of section 4047 was a proper exercise of agency discretion. The PBGC's policy against abusive follow-on plans derives from its expertise and experience with the operation of the federal insurance program. Follow-on plans undermine the statutory limitations on the PBGC's guarantee and eliminate its insurable event—plan termination. They divert insurance funds—intended to be used to provide basic benefits to workers at plan termination—to subsidize an employer's ongoing operations and benefit programs. By eliminating the adverse consequences associated with termination, follow-on plans make invocation of the federal guarantees an irresistible alternative for financially troubled employers and thereby threaten the solvency of the insurance program. Because PBGC's exercise of its discretion was not precluded by Congress and was not unreasonable, the court of appeals should not have substituted its judgment for that of the agency to which Congress expressly delegated restoration authority. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

2. Restoration of the Plans was also proper because each of the financial circumstances that had necessitated termination had changed. This decision was one that the agency, in light of its expertise and experience, was particularly well equipped to make. The court of appeals, however, rejected the PBGC's financial standard and, with no statutory basis, held that PBGC was required to show that LTV could afford to fund the Plans over the long term before restoring them. This holding impermissibly restricts the PBGC's statutory discretion and, as a practical matter, virtually eliminates the agency's restoration authority.

3. The court of appeals erred in holding that PBGC "focused inordinately on ERISA" and failed to accommodate general policies underlying bankruptcy and labor law. A requirement that an agency enforcing its statutory mandate must balance the policies of myriad other unidentified statutes would cripple the administrative process. The court's rationale was especially unwarranted here because section 4047 explicitly directs PBGC to look to its duties under Title IV in making restoration decisions. This case did not involve a direct conflict between Title IV and any other statute, *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984), or a jurisdictional conflict between agencies. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962). Indeed, no provision of Title IV or of bankruptcy or labor law required PBGC to take account of bankruptcy or labor "policies." In fact, Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws. If the courts may nevertheless create their own harmonizing principles in cases such as this, then no administrative decision will be immune from judicial remand.

4. The Administrative Procedure Act does not prescribe procedures for cases like this, where due process rights are not implicated and an agency's enabling statute contains no procedural requirements. The principle enunciated by the Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978)—that procedures should be left within the discretion of agencies—should apply equally to the informal adjudication in this case.

The PBGC's procedures, in any event, were thorough and fair. LTV can claim neither surprise nor prejudice. It had notice of the PBGC's impending action, and the PBGC considered the company's views. To impose more cumbersome requirements, as the court of appeals did, is to limit the PBGC's decisionmaking authority and its need for prompt action in the face of serious abuse of the pension insurance program.

ARGUMENT

I. PBGC ACTED REASONABLY AND WITHIN THE SCOPE OF ITS BROAD AUTHORITY UNDER SECTION 4047 WHEN IT RESTORED THE PLANS IN RESPONSE TO LTV'S ABUSE OF THE PENSION INSURANCE PROGRAM.

A. Congress Delegated PBGC Broad Restoration Authority under Section 4047 of ERISA.

Section 4047 accords the PBGC discretionary authority to restore a terminated pension plan "in any such case in which the corporation determines such action to be appropriate and consistent with its duties under [Title IV of ERISA]." 29 U.S.C. § 1347. Thus, employing exceptionally broad criteria, Congress explicitly delegated to the PBGC the authority to determine when restoration of a pension plan is "appropriate and consistent" with the agency's duties under its enabling statute. In view of the plain language of the statute, a resort to legislative history is unnecessary to define the scope of PBGC's authority. *See Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947).[14]

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[14] As a unanimous Court said in *Burlington Northern*:

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

481 U.S. at 461.

In any event, the legislative history to ERISA, as well as other provisions of Title IV, makes clear that Congress intended PBGC to have broad discretion to reverse the termination of a pension plan. Throughout Title IV and its legislative history, Congress emphasized its preference for ongoing pension plans. In fact, one of the purposes of Title IV is to "encourage the continuation and maintenance of voluntary private pension plans." 29 U.S.C. § 1302(a)(1). Thus, Congress deliberately placed limitations on PBGC's guarantee, because there is "an advantage in not fully covering all pension benefits in that this encourages those receiving the larger benefits, and who often are in a management position, to see to it that there is adequate funding of the pension plan." S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4965.

Congress recognized, moreover, that the pension insurance program was susceptible to abuse by employers. *See* 120 Cong. Rec. 4283, 29931 (1974); S. Rep. No. 383 at 87, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4971. An employer, for example, might "rely on the insurance [program] as the backup which enables it to be more generous in promising pension benefits to meet labor demands than would be the case if it knew that the benefits would have to be paid for entirely out of the assets of the employer." *Id.* Congress was also concerned that an employer might rely on plan termination "to renege on his agreement to contribute to the plan with impunity" and might shift the amount of his unfunded vested benefits to the PBGC. 120 Cong. Rec. 4283.

In section 4047, Congress gave PBGC a tool to reverse terminations whenever the agency determines such action to be "appropriate and consistent with its duties." Section 4047 was added to ERISA in conference, and as the Conference Report accompanying the provision explains:

> Neither the House bill nor the Senate amendment had any specific provision that procedures against a plan in the termination phase might be abandoned by the corporation if the employer and plan enjoyed a favorable reversal of business trends, *or if some other factor made termination no longer advisable.*
>
> Under the conference substitute, the corporation may cease any termination activities and do what it can to restore the plan to its former status. As a result, a terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent. The corporation may, when appropriate, transfer to the employer or plan administrator part or all of the remaining assets and liabilities.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58 (emphasis added).

In 1986, Congress enacted extensive amendments to ERISA in SEPPAA. One of the SEPPAA provisions amended section 4047.[15] With regard to that change, Senator Nickles, the Senate floor manager of SEPPAA, stated, "I expect that the [PBGC] will block . . . abuses of the new termination rules under Title IV by using its authority under section 4047 to negate pending or completed plan terminations and restore plans to their pretermination status." 132 Cong. Rec. 4887 (1986).

[15] Before SEPPAA, section 4047 stated that the PBGC could restore a plan terminated "under section 4042." 29 U.S.C. § 1347 (1982). At that time, section 4042 was the sole statutory vehicle for both voluntary and involuntary terminations of underfunded pension plans. *See* 29 U.S.C. § 1341(c) (1982). Under SEPPAA, employer-initiated terminations of underfunded plans may proceed exclusively under section 4041. 29 U.S.C. § 1341(c) (Supp. IV 1986). Congress accordingly amended section 4047 to state that the PBGC could restore a plan terminated "under section 4041 or 4042," 29 U.S.C. § 1347 (Supp. IV 1986), to make clear that section 4047 still permits the restoration of both voluntarily and involuntarily terminated underfunded plans.

The legislative history therefore confirms what the plain language of the statute says—that Congress granted PBGC the discretion to decide when to restore pension plans, and that it intended the agency to do so whenever the PBGC determines that restoration is "appropriate and consistent" with its statutory duties.

B. The Court of Appeals Misused Legislative History to Restrict PBGC's Congressionally Delegated Authority.

Pursuant to its broad grant of authority, PBGC has construed Section 4047 to permit restoration where an employer abuses the pension insurance program by adopting follow-on plans. This construction is plainly *not* "contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. *See also Burlington Northern*, 481 U.S. at 461; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. at 108. It should therefore have been sustained.

Ignoring the plain language of the statute, the court of appeals held that PBGC was precluded from using its restoration authority to remedy follow-on abuse. Departing entirely from traditional principles of statutory construction, the court perused the legislative history, not for a clearly expressed legislative intent contrary to PBGC's interpretation, but rather in search of an explicit affirmation that Congress intended restoration to be used to prevent follow-on abuse. Finding none, the court focused on the one example mentioned in the legislative history—improved financial circumstances—and concluded that PBGC's authority under section 4047 was limited to that

ground. This clearly was error. The mere mention in the legislative history of one *example* of when the agency may exercise its delegated authority cannot conceivably limit that authority, particularly when the example does not even purport to do so. *See Standefer v. United States*, 447 U.S. at 20 n.12 (such an argument "would permit an omission in the legislative history to nullify the plain meaning of a statute").

The court compounded its error by relying on Congress's inaction in December of 1987 on a House Ways & Means Committee proposal to ban all post-termination pension plans. As the court itself acknowledged, Pet. App. 18a, this proposal, which failed almost three months after PBGC's decision in this case, would not have been applicable even if enacted. Moreover, the proposal that was before the Committee was of broader scope than PBGC's longstanding follow-on policy.[16] The court nevertheless concluded that Congress's failure to enact this proposal "reflect[ed] the continuing consensus not to include the establishment of follow-ons as a basis for a restoration decision." *Id.*

As this Court has repeatedly cautioned, subsequent legislative history is a "hazardous basis" for inferring the intent of an earlier Congress. *E.g., Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 956 (1989); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. at 117; *United States v. Price*, 361 U.S. 304, 313 (1960). Subsequent legislative history is a particularly dangerous basis for interpreting a prior statute when it involves,

[16] This proposal would have prevented not only the sponsor of a terminated plan, but all members of the sponsor's controlled group, from establishing *any* post-termination retirement plan without PBGC's permission for five years after termination, unless all liabilities to the PBGC had been paid. H.R. 3545, 100th Cong., 1st Sess. § 9532(e) (1987). PBGC's policy does not prohibit the adoption of non-abusive post-termination benefit arrangements, and does not implicate employees of other companies in the sponsor's controlled group. *See supra* at 7 n.8.

as here, a proposal that does not become law. Congressional inaction "has no persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." *United States v. Wise*, 370 U.S. at 411. *Accord Bruch*, 109 S.Ct. at 956 ("The bill's demise may have been the result of events that had nothing to do with Congress' view on the propriety of [the issue in question]"). For a court nevertheless to rely on it therefore creates a substantial risk that the views of a few representatives will be used to undo the work of the majority that passed the original statute.

These principles are particularly applicable here. Congress was well aware when it made extensive revisions to ERISA in the Pension Protection Act in 1987 that the PBGC, consistent with its longstanding policy, had just restored the LTV plans. *See* H.R. Rep. No. 391, 100th Cong., 1st Sess., pt. 1, at 106-07, 178, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-81, 2313-149; Congressional Budget Office, *Federal Insurance of Private Pension Benefits* 25 n.1 (October 1987). Despite that knowledge, Congress did not amend section 4047 to restrict PBGC's restoration authority. Thus, the inference that Congress approved of PBGC's policy is far more powerful than the one the court of appeals drew. *See Bob Jones University v. United States*, 461 U.S. 574, 599 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned") (citation omitted).

In sum, PBGC's interpretation of its restoration authority is consistent with the broad language of section

4047, with the functioning of the statutory scheme, and with contemporaneous statements of congressional purpose. The court of appeals erred in concluding that the agency was precluded from adopting its interpretation of the statute simply because, after the agency had invoked its statutory powers to prevent abuse, a subsequent Congress failed to enact an even more sweeping prohibition.

C. PBGC Reasonably Determined that Restoration for Follow-on Abuse was Appropriate and Consistent with its Duties under Title IV of ERISA.

Because the statute explicitly confers upon the agency and not the courts the power to decide whether the broad criteria of section 4047 are met, the PBGC's decision must be sustained unless an abuse of discretion is plainly shown. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977); *see Chevron*, 467 U.S. at 843-44; *Chenery*, 332 U.S. at 208-09. Like the "fair and equitable" and "public interest" standards in the Holding Company Act that this Court addressed in *Chenery*, the "appropriate and consistent" standard in section 4047 was devised to give the PBGC broad power to develop criteria to deal with specialized problems on a case-by-case basis. *See id.* at 202-03, 208. The exercise of that power necessarily requires the formulation of policy and the use of informal discretion to evolve standards to complete the legislative scheme. *Id.* at 203; *see also Chevron*, 467 U.S. at 843. In exercising its discretion in this case, the PBGC relied on its administrative experience, including its appreciation of the statutory purposes and the complexities of the problem of abuse of the pension insurance program.[17]

[17] The PBGC had full authority to interpret and apply Section 4047 for the first time in its adjudication in this case. *Chenery*, 332 U.S. at 203. The PBGC's decision, however, was based on a longstanding agency policy, articulated as early as 1981 in Opinion Letter 81-11, and consistently followed and applied since that time. And contrary to the court of appeals' view, these opinion letters were plainly applicable, notwithstanding the fact that they "all involve cases of voluntary rather than involuntary terminations." Pet. App. 20a. Section 4047 applies to all terminations of insufficient plans, whether initiated by the employer under section 4041 of ERISA or the agency under section 4042. Because one of PBGC's duties is to limit the transfer of unfunded pension liabilities onto the single-employer pension insurance program to "cases of severe hardship," 29 U.S.C. § 1001b(b), it exercises its discretionary authority to terminate pension plans involuntarily when the risk to participants and the insurance program leave it no other choice. If follow-on plans are available, an employer may take steps, such as refraining from making contributions, to compel an involuntary termination by the agency. In most cases, in fact, it is actions of an employer that give rise to the need for an involuntary termination. Here, for example, LTV did everything it could to impel PBGC to terminate the Plans involuntarily. *See supra* at 9.

The PBGC decided, as a matter of policy, that restoration was an appropriate remedy for LTV's abusive follow-on plans. The wisdom of that policy is not before this Court. *Chevron*, 467 U.S. at 865-66; *Chenery*, 332 U.S. at 207. Rather, the Court's duty ends when it becomes apparent that the PBGC's policy "is a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866. It plainly is.

The PBGC has determined that follow-on plans abuse the pension insurance program and may be a basis for restoration for two reasons. Follow-on plans eviscerate the statute's coinsurance features, thereby eliminating the checks on termination of underfunded plans that are built into Title IV. *See* PBGC Opinion Letter 81-11, Pet. App. 162a-63a. They also negate plan termination—Title IV's insurable event—and thereby contravene the fundamental premise of Title IV, as construed by PBGC, that insurance is to be paid only when a pension arrangement terminates in substance as well as in form. *See* PBGC Opinion Letter 86-27, Pet. App. 172a-73a.

Congress limited the benefits PBGC may pay when an underfunded plan terminates "because [Title IV] in-

surance is not intended as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it." S. Rep. No. 383 at 81, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4965. In practice, it was "expected that [the insurance] will fully cover the great bulk of all benefit payments." *Id.*[9] As noted above at page 21, however, Congress believed there was an advantage in limiting the benefits that would be paid, since that would encourage adequate funding of pension plans, and therefore discourage plan termination. *Id.* at 81-82.

The limitations on pension insurance payments thus operate as a form of coinsurance. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989). Not only do they encourage employees to see that their pension plan is adequately funded, but they also align the interests of employees with the PBGC and against termination. *Id.* The limitations thus are important to one of Congress's central purposes under Title IV—encouraging ongoing plans and limiting plan terminations. 29 U.S.C. §§ 1001b(b), 1302(a)(1).

Follow-on plans greatly minimize or even eliminate this coinsurance feature of Title IV because they effectively do away with the benefit limitations. Those benefits PBGC does not guarantee—or a substantial portion of them—are paid from the follow-on plans. *See supra* at 7. Thus, follow-on plans enable an employer to overcome the resistance of its employees and their union to termination, as happened in this case. *See supra* at 10-11. If follow-on plans are permitted, they will inevitably lead to additional terminations that would jeopardize the pension insurance program.

[9] In this case, for example, approximately 91 percent of the benefits of LTV's retirees were covered by pension insurance. JA 234. The follow-on plans made up 90-100 percent of the retirees' non-insured benefits. *Supra* at 10. In addition, the follow-on plans gave active employees credit for their service under the old Plans, thereby allowing them to earn and receive benefits to which they would not otherwise have been entitled. *Id.*

PBGC has also determined that follow-on plans abuse the pension insurance program and may warrant restoration because they result in PBGC effectively subsidizing an ongoing pension arrangement, rather than providing basic benefits to workers who would otherwise have none when their pension plan terminates. Title IV makes clear that PBGC's role is to provide benefits when an underfunded single-employer plan *terminates.* Thus, 29 U.S.C. § 1322(a) states that PBGC shall guarantee the payment of all nonforfeitable benefits under a single-employer plan "which terminates." Likewise, 29 U.S.C. § 1361 provides that PBGC "shall pay benefits under a single-employer plan *terminated* under this title." (Emphasis added.)[10] Follow-on plans are inconsistent with the statutory scheme because they use PBGC insurance to fund employers' ongoing benefit programs. Consequently, PBGC's insurable event—termination—has not in substance occurred.

Follow-on plans therefore convert PBGC insurance from a safety net of last resort for workers into an unintended subsidy for a company's ongoing pension program. And if one company is allowed to obtain such a

[10] Congress's choice of words in section 1361 was plainly deliberate, for in the next sentence it stated that PBGC "shall provide financial assistance to pay benefits under a multiemployer plan which is insolvent under [29 U.S.C. § 1426 or § 1441(d)(2)(A)]." Thus, *insolvency*, not termination, is the insurable event under the multiemployer insurance program. Insolvent multiemployer plans reduce benefits, 29 U.S.C. § 1426, and, if necessary, obtain financial assistance from the PBGC "to enable *the plan* to pay basic benefits under the plan." 29 U.S.C. § 1431(a) (emphasis added). Congress could have similarly provided that PBGC should provide financial assistance to ailing single-employer plans to enable them to pay benefits while ongoing, but chose instead to permit the payment of insurance funds only when a single-employer plan *terminates*, and thus to define the insurable event as termination.

PBGC subsidy for its pension costs, other companies with severely underfunded pension plans will surely try to follow its example. Indeed, they may be forced to do so to keep up with competitors who have reduced costs by unloading their pension liabilities on the PBGC. *See* brief *amicus curiae* of Armco, Bethlehem Steel Corp., *et al.* The resulting terminations could overwhelm PBGC, whose deficit (even without the LTV Plans) already exceeds $1.5 billion. Congress could raise PBGC's premiums, but employers with well-funded plans would likely balk at having to increase their payments to subsidize other, less responsible employers. They might well choose to terminate their plans or convert them to defined contribution plans not covered by Title IV, leaving the pension insurance program with a smaller base of healthy premium payers. Indeed, this is already occurring. *See* J. Chernoff, *Crushed by the Weight*, Pensions and Investment Age 1, 55 (September 4, 1989).

Thus, by using its restoration authority to remedy follow-on abuse, PBGC discourages employers from terminating their pension plans. This is clearly appropriate and consistent with the agency's statutory duties. It furthers the congressionally stated purposes of encouraging the continuance of pension plans, of providing for the timely and uninterrupted payment of benefits to all persons protected by the insurance program, and of maintaining premiums at reasonable levels. *See* 29 U.S.C. § 1302(a).

Under these circumstances, PBGC's determination to use its restoration authority in response to the establishment of follow-on plans is plainly reasonable. And the court of appeals did not truly find otherwise. Instead, the court merely disagreed with the wisdom of PBGC's policy choice, and took it upon itself to substitute its views for those of the agency. In doing so, the court not only ignored the admonition of this Court that "[o]ur

Constitution vests such responsibilities in the political branches," *Chevron*, 467 U.S. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)), it also ignored Congress's plain and unequivocal delegation of authority to the PBGC to decide when and on what grounds terminated pension plans should be restored.[20]

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[20] Although it was evidently not a basis for the court of appeals' judgment, since the court struck down PBGC's follow-on policy as a matter of law, the court also concluded that PBGC did not adequately show that LTV's follow-on plans substantially replace the benefits lost as a result of the termination. Pet. App. 19a. This, too, was error. PBGC must have flexibility in combating abuse of the pension insurance program. *Cf. Chenery*, 332 U.S. at 207-08 (abuse may raise questions so subtle that the law can deal with it only by a broad prohibition). Thus, the agency has reasonably determined that its follow-on policy applies even if there are "relatively small differences" between pre- and post-termination benefits. Opinion Letter 86-27 n.5, Pet. App. 177a. Similarly, PBGC has made a rational determination that all of the components of an employer's post-termination scheme should be considered together in determining whether it constitutes a *de facto* continuation of the terminated plans. PBGC Opinion Letter 81-11, Pet. App. 162a; PBGC Opinion Letter 86-27, Pet. App. 177a. The court of appeals apparently believed that there must be virtual identity between the old and new plans. Under its view, however, sophisticated parties could easily circumvent PBGC's policy. They could, moreover, hamstring the agency with endless. hair-splitting litigation, thereby undercutting the discretionary powers that are necessary to make the PBGC's enforcement scheme function.

In any event, PBGC's determination that LTV's follow-on plans were abusive was plainly reasonable. The administrative record showed that the follow-on plans replaced 90-100 percent of the benefits lost by retirees, and granted credit to active participants for their service under the old Plans, thereby replacing most of the benefits they lost as well. *See supra* at 10-11. Indeed, as the district court found, it was "not disputed that one of the USWA's primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and that the various components of LTV's follow-on plans, considered together, "*substantially achieved that goal.*" Pet. App. 109a (emphasis added).

II. PBGC ACTED REASONABLY AND WITHIN THE BROAD SCOPE OF ITS AUTHORITY WHEN IT RESTORED THE PLANS BECAUSE THE CIRCUMSTANCES NECESSITATING TERMINATION HAD CHANGED.

The court of appeals acknowledged that financial improvement is a valid basis for restoration. Pet. App. 21a. The court failed to recognize, however, that in section 4047, Congress expressly delegated *to the PBGC* the broad authority to determine *when* restoration for improved financial circumstances—like restoration for other reasons—is "appropriate and consistent with its duties" under Title IV. 29 U.S.C. § 1347. The PBGC's exercise of that authority in this case—restoring the Plans because there was no longer a financial basis for termination—is fully consistent with the provisions and purposes of Title IV and therefore should have been sustained.

Congress gave the PBGC a variety of flexible powers under Title IV so that the agency could effectively address the specialized and varied problems with which it is confronted on a daily basis. The PBGC, for example, has authority to accept or reject the termination date proposed by the plan administrator in a distress termination. 29 U.S.C. § 1348. The agency also has broad discretionary authority to terminate a plan involuntarily "whenever it determines" that a plan has failed to meet the minimum funding standards or that the risk to the PBGC may otherwise increase unreasonably. 29 U.S.C. § 1342(a)(1), (4).

The statute, however, does not favor terminations. When Congress first enacted Title IV of ERISA in 1974, it specifically charged PBGC with the responsibility for "encourag[ing] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1). When it adopted

SEPPAA in 1986, Congress stated that the amendments were intended to limit the ability of employers to transfer their unfunded liabilities to the pension insurance system to "cases of severe hardship" and "to increase the likelihood that full benefits will be paid to participants and beneficiaries." 29 U.S.C. § 1001b(b). More specifically, while Congress required the PBGC to obtain court approval for terminations if the plan administrator does not consent, it granted the PBGC broad power to restore plans without court approval or the administrator's consent. As the district court here held, this makes sense because upon termination participants may suffer benefit reductions, while upon restoration "[t]he immediate effect on participants, whose interests ERISA primarily protects, is either no change or an increase in benefit payments." Pet. App. 89a.

Restoration under section 4047 is simply the reversal of a termination. The PBGC may stop a termination in progress "whenever the corporation determines that a plan which is to be terminated . . . should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant." 29 U.S.C. § 1347. Section 4047 authorizes PBGC to restore a terminated plan "to its pretermination status" by transferring control of the plan assets and liabilities back to the employer. And PBGC may restore a terminated plan "if appropriate and consistent" with its statutory duties. *Id.*

Here, PBGC determined that restoration was appropriate because the financial grounds for termination no longer existed. Because termination is generally harmful to workers and retirees, there is every reason to believe Congress would want PBGC to restore a plan if the facts on which a termination was predicated have changed (or have been discovered to be other than as originally thought). Thus, PBGC's determination was fully con-

sistent with Congress's goals of encouraging the continuation of private pension plans, limiting terminations to cases of severe hardship, and increasing the likelihood that full benefits will be paid to plan participants. Unnecessarily restricting restoration, as the court of appeals did here, is inconsistent with those goals.

PBGC terminated the Plans because the Plans had not met ERISA's minimum funding requirements and because the possible long-run loss to the insurance program was expected to increase unreasonably, absent immediate termination. *See* 29 U.S.C. § 1342(a)(1), (a)(4). That decision was based on the Plans' severe underfunding; LTV's statement that it could not and would not fund the Plans; the depressed state of the steel industry, including LTV Steel, that economic experts predicted would not improve; and the increases in the underfunding that were anticipated as a result of projected shutdowns and LTV's cessation of contributions. *See* JA 128-31, 137-40. The PBGC looked at the same factors in considering whether to restore the Plans, and found that each of them had changed. *See supra* at 11-13. PBGC therefore reasonably determined that termination was no longer "appropriate" or "consistent with its duties" under Title IV.

The court of appeals decided, however, that restoration is appropriate only where the PBGC establishes the "long term" ability of a company to fund its plan. Pet. App. 22a, 24a. There is no basis in Title IV for this decision.[21] Title IV does not require the PBGC to review

[21] Indeed, the court of appeals cited nothing in Title IV in support of its decision. Instead, the court relied exclusively on wholly inapposite provisions in Title I of ERISA and IRS regulations. *See* Pet. App. 24a-25a. Contrary to the court's understanding, however, the prohibition in Title I of ERISA against "pay-as-you-go" funding, 29 U.S.C. § 1002(31), does not relate to how long a plan exists.

ongoing plans to determine whether plan sponsors have the "long term" ability to fund the plans; there similarly is no statutory foundation for requiring such an affirmative determination where PBGC decides to restore—*i.e.*, to reverse a termination. PBGC's approach, which looked to whether the predicate for termination continued to exist, is consonant with the function of restoration in the statutory scheme—as a mechanism for "undoing" a termination when changed conditions make termination no longer advisable.

The court apparently adopted its "long-term" ability-to-fund standard because of its concern over "the possibility that the Plans would have to be reterminated." Pet. App. 25a. However, in view of the clear statutory preference for plan continuation, the mere "possibility" of retermination at some future date is an insufficient reason to preclude the PBGC from restoring a plan.

In any event, the court's concern was based on a misunderstanding of the statutory scheme. The court incorrectly assumed that the PBGC would be required to reterminate the Plans involuntarily if, at some future time, LTV were unable to comply with ERISA's minimum funding standards. *See* Pet. App. 25a. PBGC is *required* to terminate a plan, however, only when the plan has insufficient assets to pay benefits "currently due." 29 U.S.C. § 1342(a). It *may* seek to terminate a plan

It simply reflects Congress's concern that plans be reasonably funded for as long as they exist.

There is similarly no basis for the court's reliance on an IRS regulation that the court cited for the proposition that plans must be "permanent." 26 C.F.R. § 1.401-1(b)(2) (1988). That regulation merely provides that for a plan to be tax-qualified, the employer must intend, at the plan's inception, to establish "a permanent as distinguished from a temporary program," and that the plan not be abandoned "for any reason other than business necessity within a few years after it has taken effect." *Id.* These Plans met the tax-qualification requirements in the regulation long ago.

after making a threshold determination that a plan sponsor has missed one or more minimum funding contributions in the past, *id.*, but exercises its discretion to do so only when necessary to protect the insurance program.[22]

By imposing its long-term ability-to-fund requirement, the court interfered with precisely "the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Chenery*, 332 U.S. at 209. The PBGC has been analyzing the financial condition of plans and employers since the agency's inception in 1974, and has determined through this experience that the kind of long-term predictions required by the court's decision simply cannot be made on a reliable basis. In a report prepared for Congress in 1987 after numerous in-depth studies, the PBGC determined, and its outside experts concurred, that predicting when the pension plans of particular companies will terminate is "essentially impossible." PBGC, *Promises at Risk* 43-44, reprinted in *PBGC Proposal to Initiate a Variable Rate Premium System: Hearings Before the Subcomm. on Oversight of the House Committee on Ways*

[22] The statutory scheme has flexibility to allow an employer experiencing temporary financial difficulties to continue its pension plans. For example, an employer short of cash may, within certain limits, contribute certain non-cash assets to its pension plans. *See* 29 U.S.C. §§ 1107, 1108(e). An employer may also ask the Internal Revenue Service to waive its minimum funding obligation for a particular year. *See* 26 U.S.C. § 412(d)(1). If the waiver is granted, the amount owed for that year is amortized over the next 15 years. 26 U.S.C. § 412(b)(2)(C), (d)(1), (d)(3). However, before granting a waiver in any case where the amounts owed are large, the IRS is required to consult with the PBGC, and may, as a condition of the waiver, require security that may "be perfected and enforced only by the [PBGC]." 26 U.S.C. § 412(f)(3)(A), (B). The PBGC therefore has substantial experience regarding funding waivers. Thus, contrary to the court of appeals' conclusion (Pet. App. 22a), PBGC's estimate of LTV's 1987 funding obligation, which was premised on the assumption that LTV could receive waivers of 1984-86 contributions, was not unreasonable.

and Means, 100th Cong., 1st Sess. 52 (1987). For this reason, the PBGC recommended against a pension insurance premium based upon a company's ability to fund its plans. *See id.* at 49-57. Congress agreed.

The PBGC's conclusion here thus "rest[ed] squarely in that area where administrative judgments are entitled to the greatest amount of weight by the appellate courts," and should not have been disturbed below. *Chenery*, 332 U.S. at 209; *see Batterton v. Francis*, 432 U.S. at 426. In fact, this case demonstrates the inherent unreliability of long-term predictions of this type. Steel industry experts widely agreed in late 1986 that the industry would continue its then-prevalent downward trend. *See, e.g.*, Oppenheimer & Co., Inc., *Steel—Appropriate Methods of Demand Forecasting* (Nov. 1986), available on NEXIS, Company library, Ind. file. Almost uniformly, they failed to predict the dramatic improvements in the industry that began just a few months later, in early 1987.

While PBGC therefore chose not to apply a "long-term" criterion, PBGC did find that LTV could afford to fund the Plans, at least for the short term, JA 345, 317-18, so there plainly was no danger of immediate retermination.[23] The court of appeals, however, challenged even this finding. Drawing an unnecessary conclusion that could have serious implications for the pension insurance program, the court erroneously stated that the contribu-

[23] In addition, the PBGC knew that, even without additional contributions, the Plans had enough money at the time of restoration to continue paying benefits for at least the immediate future, so that a mandatory involuntary termination under 29 U.S.C. § 1342(a) would not be necessary. *See* AR 1153. Indeed, one of the reasons the PBGC did not restore a fourth LTV pension plan, the Republic Salaried Plan, was because that Plan did not have enough money to pay benefits currently due, *see* JA 316, 318, and even if funded still might not be able to meet current obligations. *Id.* Thus, PBGC was careful not to take the kind of precipitous action that underlay the court's concern about the possibility of retermination.

tions that would be due the Plans would receive "no special priority" in LTV's bankruptcy proceeding. Pet. App. 24a. This conclusion, casually adopted after only minimal discussion, is contrary to all existing case law. *E.g., In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983); *Columbia Packing Co. v. PBGC*, 81 Bankr. 205 (D. Mass. 1988); *In re Robinson Truck Line, Inc.*, 47 Bankr. 631, 637-38 (Bankr. N.D. Miss. 1985).[24] If it is followed, employers will generally be precluded during bankruptcy proceedings from making the periodic contributions to their pension plans that ERISA requires because the contributions would not be treated as "necessary costs" of running the business that are payable on an ongoing basis. *See* 11 U.S.C. § 503(b). Benefit payments, however, must continue to be made from an ongoing plan. Thus, plans that would otherwise continue will have to be terminated because their assets will be depleted, rendering them unable to pay benefits currently due. *See* 29 U.S.C. § 1342(a).

But the court of appeals' erroneous approach has other, even more significant practical consequences. The court's statement that "any claims arising out of LTV's obligation to pay into the pension fund plans are pre-petition debts" (Pet. App. 23a) means that when a plan does terminate, the PBGC, which is normally accorded priority status for at least a portion of its claims for unpaid contributions due the plan, will become merely a general

[24] The court of appeals' citation to *Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 103-04 (2d Cir. 1986), is inapposite. *McFarlin's* addressed the bankruptcy priority of the withdrawal liability owed by an employer to a multiemployer pension plan when it ceases to participate in the plan. Whatever the merits of that decision, it was premised on the notion that the withdrawal liability in that case related to work performed by the company's employees before the filing of the bankruptcy petition, and was therefore a "pre-petition" debt. Contributions payable to an ongoing pension plan during bankruptcy, however, are like wages—they are related to employees' post-petition work, and are therefore entitled to be paid before the claims of general unsecured creditors.

unsecured creditor. Thus, under the court of appeals' conclusion, termination is even less expensive than it otherwise would be, and the incentive to terminate increases accordingly.

Moreover, just as the PBGC would not have been able to prove with any degree of reliability LTV's "long-term" ability to fund the Plans in this case, it will be unable to do so in other cases, particularly in cyclical and volatile industries like steel. As a practical matter, therefore, the court's imposition of its own standard drastically curtails—and perhaps eliminates—Congress's broad delegation of restoration authority to the agency in Section 4047.

III. PBGC WAS NOT REQUIRED TO CONSIDER INCHOATE POLICIES EMANATING FROM BANKRUPTCY AND LABOR LAW IN EXERCISING ITS AUTHORITY UNDER SECTION 4047.

Citing the general rule that an agency must take all relevant factors into consideration, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the court of appeals held that PBGC's restoration decision was arbitrary and capricious because PBGC "focused inordinately on ERISA" and did not adequately consider the policies underlying the bankruptcy and labor laws. Pet. App. 14a-18a. This aspect of the court of appeals' rationale is virtually a caricature of the method of reasoning that should be employed in reviewing agency action under the Administrative Procedure Act and creates a dangerous precedent with far-reaching implications.

At the outset, we note that the court of appeals did not hold that PBGC's decision conflicted with any provision of the bankruptcy or labor laws. Thus it is unnecessary for PBGC to assert that the broad language of section 4047 constitutes an implicit repealer of inconsistent

provisions in other statutes.[25] Nor is this a case in which judicial intervention is necessary to reconcile a direct conflict between two statutes, as in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (NLRB enforcement of National Labor Relations Act "would run directly counter to the express provisions of the Bankruptcy Code"). Moreover, this is not a case in which an agency's action "trench[es] upon the . . . jurisdiction" of another agency, as in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962).

The court of appeals nevertheless held that bankruptcy and labor law, as well as ERISA, are "involved" and therefore "there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them." Pet. App. 14a-15a.

Whatever the validity of this technique of judicial review in other contexts, it is inapplicable here by virtue of the plain language of section 4047. This section authorizes PBGC to restore terminated plans in any case in which PBGC determines such action to be "appropriate and consistent with its duties *under this title*," which is Title IV of ERISA. At the very least, this language rebuts the court of appeals' criticism that PBGC's decision was arbitrary because the agency "focused inordinately on ERISA." Pet. App. 14a.

Even without the unique language of section 4047, however, the court of appeals' rationale is an improper basis upon which to hold an agency's decision invalid.

[25] For this reason, the court of appeals' reasoning is not bolstered by its citation (Pet. App. 16a) to the savings clause in section 514(d) of ERISA, 29 U.S.C. § 1144(d), which provides that "[n]othing in this title [Title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." In any event, this clause applies by its terms to Title I and section 4047 appears in Title IV of ERISA.

An agency's duties derive from its own enabling act, not from other federal statutes. *Community Television of Southern Calif. v. Gottfried*, 459 U.S. 498, 509-11 & n.17 (1983). Even where an agency is directed to regulate in the "public interest," this Court has held that the agency should take other public policies into account only insofar as they are "directly related" to the agency's own duties. *NAACP v. FPC*, 425 U.S. 662, 670-71 (1976).

There are thousands of statutes in the United States Code, and they could be said to embody countless policies. If an agency's decision can be invalidated whenever a reviewing court can point to an arguably relevant statutory policy that was not considered, then no decision is immune from judicial remand. Here, for example, the court of appeals might also have faulted the PBGC for failing to consider the implications of the policies underlying the antitrust or foreign trade laws.

An additional flaw in the court of appeals' reasoning is the court's assumption that agencies must give effect to the "policies and goals" of other statutes (Pet. App. 17a) apart from what the statutes actually provide by their terms. As this Court recently observed:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original) (per curiam). *Accord Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). This flawed approach is particularly harmful when the court attempts to discern simplistic

policies emanating from complex statutes such as the Bankruptcy Code or the National Labor Relations Act.

For example, the court of appeals cited 11 U.S.C. § 362, the "automatic stay" provision in the Bankruptcy Code, for the general proposition that bankruptcy is intended to shield a debtor from the financial pressures imposed by its creditors and to promote an equitable distribution of the debtor's assets. Pet. App. 15a (citing *Bildisco*, 465 U.S. at 528). This Court, however, has recognized in the context of section 362 that the Bankruptcy Code does not give a debtor "*carte blanche* to ignore non-bankruptcy law." *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986). As the Court stated, "If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id.* at 501 (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)). Certainly no clear intent can be derived from the general proposition cited by the court of appeals. Moreover, section 362 was clearly irrelevant in this case because, as both the court of appeals and the district court recognized, restoration is a governmental regulatory action exempted by 11 U.S.C. § 362(b)(4) from the automatic stay. Pet. App. 24a, 73a-81a.

The court of appeals also cited section 1113 of the Bankruptcy Code as "encourag[ing] collective bargaining for debtors in reorganization," including collective bargaining over pensions. Pet. App. 16a, 18a. Similarly, the court cited this Court's decision in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981), for the proposition that "[a] fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace . . . [and] [c]entral to achievement of this purpose is the promotion of collective

bargaining." Pet. App. 15a-16a. No one would dispute these propositions. They in no way suggest, however, that the fruits of collective bargaining are therefore insulated from the constraints of applicable law. Nothing in labor law or "policy" requires the government to subsidize a product of private collective bargaining that contravenes national pension policy. That is, however, the direct effect of the court of appeals' decision.

The PBGC did not interfere with private collective bargaining in this case. To the contrary, application of the PBGC's follow-on policy merely operated to withdraw PBGC's guarantee and thus to deny a PBGC subsidy for LTV's ongoing pension program. Withdrawal of that subsidy certainly may force the bargaining parties to reassess their priorities, but, as this Court has held, "The terms of any collective-bargaining agreement must comply with federal laws." *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982). *See also Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

In any event, Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws, making it unnecessary—and inappropriate—for the court of appeals to examine the policies and goals of those statutes to create its own harmonizing principles. For example, Congress provided that an employer in bankruptcy reorganization may be able to terminate an underfunded pension plan in a distress termination if it can demonstrate to the bankruptcy court that it will not otherwise be able to reorganize. *See* 29 U.S.C. § 1341(c)(2)(B)(ii).[26] Congress wove bankruptcy considerations into

[26] The legislative history reflects that, in fashioning this test, Congress "tried to balance the need to limit access to the insurance system to cases of genuine need against the danger of making the tests so stringent that nothing short of total liquidation would qualify for PBGC assistance." H.R. Rep. No. 241, 99th Cong., 1st Sess., pt. 2, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 707.

other provisions of Title IV as well. *E.g.*, 29 U.S.C. §§ 1342(e), 1362(e)(1)(B)(ii), 1368(c)(2). Congress also incorporated labor law concerns into Title IV by providing that an employer may not terminate a pension plan voluntarily "if the termination would violate the terms and conditions of an existing collective bargaining agreement." 29 U.S.C. § 1341(a)(3).

In view of the plain language of section 4047, PBGC properly focused on Title IV of ERISA in deciding to restore LTV's Plans. The court of appeals erred in requiring PBGC to consider the "policies and goals" of other statutes, particularly where, as here, PBGC's action did not conflict with any provision of those other statutes, and Congress itself has already harmonized the provisions of Title IV with these other laws. A requirement that an administrative agency "balance" or "accommodate" every other statute whose general policy is arguably relevant would cripple the administrative process and provide the courts with unfettered freedom to substitute their policy views for those of the agency charged by Congress with the responsibility for making such judgments.

IV. PBGC PROPERLY DETERMINED THE INFORMAL PROCEDURES APPLICABLE TO RESTORATION.

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), this Court made clear that where the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the Administrative Procedure Act establishes the maximum procedural requirements a reviewing court can impose on agency rulemaking. *Id.* at 524. As the Court stated, "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.* Thus, this Court "has for more than four decades emphasized that the formulation of procedures [is] basically to be left within

the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgment." *Id.*

The same principles should apply to the PBGC's informal adjudication in this case. It is undisputed that PBGC was entitled to proceed by informal adjudication and that the APA does not impose any procedural requirements applicable to the informal adjudication in this case. Moreover, as the court of appeals acknowledged, section 4047 "does not discuss the procedures that are to be followed by PBGC when reaching a restoration decision." Pet. App. 26a. Equally important, no protected liberty or property right was implicated by the restoration decision; none was asserted by LTV, and none was identified by the court. PBGC's restoration decision merely reinstated pension obligations that LTV itself had freely undertaken and of which it had no right to be relieved.[27]

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[27] Although the court of appeals did not say so explicitly, its invocation of "principle[s] of fundamental fairness" suggests that due process was in fact the basis for the court's holding that PBGC's procedures were insufficient. *See* Pet. App. 26a. However, the requirements of procedural due process apply only to the deprivation of rights or interests encompassed by the fifth and fourteenth amendments. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). This Court has emphasized that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. *Accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement," grounded in state or federal law, "which cannot be removed except 'for cause'") (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)).

In this case, restoration, like termination, resulted from the PBGC's exercise of discretionary authority under Title IV of ERISA. The PBGC terminated the Plans to preserve the integrity of the pension insurance program for the benefit of the retirees it serves, not because LTV had any right to termination. And al-

In any event, the PBGC properly exercised its procedural discretion in this case. Its procedures, while informal, were thorough and fair. PBGC made LTV fully aware of its objections to the follow-on plans. It repeatedly gave LTV the opportunity to present its side of the dispute or work out other arrangements, and advised LTV that restoration was under consideration. LTV cannot claim otherwise. Indeed, at the time the follow-on plans were negotiated, LTV and the USWA included a provision in the collective bargaining agreement that allowed either side to invalidate the agreement if PBGC took action "to reinstate LTV Steel's pension liabilities." JA 155.

PBGC first identified abusive follow-on plans as a potential basis for restoration in its published 1981 and 1986 opinion letters. *See supra* at 7-8; Pet. App. 159a, 172a. PBGC advised LTV explicitly that its proposed follow-on plans violated the agency's policy as soon as the plans were first tentatively negotiated in May 1987. JA 230. On July 1, 1987, 21 Senators and Representatives asked PBGC to "withhold any administrative or legal action" with respect to LTV's follow-on plans until they met with the Executive Director of PBGC to discuss the matter. JA 147. The Executive Director and representatives of the PBGC, LTV, and the USWA met with the members of Congress on July 9, 1987. JA 149. The PBGC then had lengthy meetings with LTV and union representatives on July 10 and 13, 1987, to discuss the follow-on plans. JA 262-67, 348. In these meetings, the PBGC advised LTV and the union of alternative arrangements they could adopt to provide relief to retirees and employees without running afoul of ERISA.[28]

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though LTV may have had a "need or desire" or a "unilateral expectation" that the Plans remain terminated, it clearly had no *entitlement* to it. *See Roth*, 408 U.S. at 577.

[28] PBGC told LTV and the union that it would not object to the establishment of a defined contribution plan for active workers that provided benefits on the basis of employees' post-termination service, and that benefits lost by retirees could be satisfied to the extent permitted by Section 4049 of ERISA, 29 U.S.C. § 1349. JA 262-67.

When LTV nevertheless sought bankruptcy court approval to fund the follow-on plans, PBGC's Executive Director and another senior agency official submitted detailed affidavits to the bankruptcy court, explaining again the PBGC's objections to the plans. JA 226-37. At the hearing on July 16, 1987, LTV cross-examined the Executive Director about these objections. AR 592-604. In addition, PBGC officials corresponded extensively with LTV's Chief Executive Officer and its Chief Financial Officer, and the agency repeatedly warned LTV that restoration of the terminated Plans was an option if LTV refused to abandon its abusive follow-on plans. JA 262-67, 330-42, 348. Thus, on August 31, 1987, PBGC's Principal Deputy Executive Director wrote to LTV's CEO Raymond Hay that "one of several options under review at the Agency is 'Restoration' of the plans pursuant to Section 4047 of [ERISA]." JA 330. PBGC again warned LTV that restoration was being considered in a letter dated September 14, 1987. JA 338. Mr. Hay acknowledged this in a letter dated September 10, 1987. JA 336.

LTV likewise had full knowledge that its financial condition was implicated in the restoration proceedings. As noted above at page 22, the legislative history specifically identifies a "favorable reversal of business trends" as a sufficient basis for restoration. H.R. Conf. Rep. No. 1280 at 378, *reprinted* in 1974 U.S. Code Cong. & Admin. News at 5157. The termination of LTV's Plans, to which LTV had consented, was based solely on financial considerations, including LTV's own representations about its ability to fund the Plans. *See supra* at 9. In September 1987, aware that PBGC was considering restoration, LTV CEO Hay wrote to PBGC urging that the Plans not be restored because "[a]bsolutely nothing has occurred to alter" the financial grounds on which the

Plans were terminated. JA 337. He further argued that "[i]f the plans were to be restored, the ultimate reorganization of the company would be jeopardized and the interests of retirees, employees, creditors and shareholders would be adversely affected." *Id.*

The PBGC, however, relied on the specific data set forth in LTV's Forms 10-K and 10-Q filed with the SEC. AR 671-1084. The PBGC also reviewed a report of LTV's Creditors' Committee, which was based on data provided by LTV. AR 15-98; JA 317. The Forms 10-K and 10-Q must be accurate and must include all data material to LTV's financial condition. 15 U.S.C. §§ 78m(a), 78f(f); SEC Rule 12b-20, 17 C.F.R. § 240.-12b-20 (1988). And LTV has a fiduciary obligation to supply accurate and complete financial information to its creditors. 11 U.S.C. § 1107 (incorporating 11 U.S.C. §§ 1106(a)(1), 704(7), 704(8)). Accordingly, LTV cannot complain that the PBGC relied on incorrect data or that anything material was not considered.

Moreover, the PBGC accorded LTV numerous opportunities to rebut the factual bases for restoration. In addition to the numerous meetings cited above and the proceedings in the bankruptcy court, PBGC's Executive Director informed LTV on September 18, 1987, that the PBGC would "be happy to consider any additional information [LTV] might wish to supply." JA 348. To that end, she offered to send her principal deputy to LTV's headquarters in Dallas to review any such information. JA 348-49. Instead, LTV representatives came to Washington, where the parties met on September 19 and 21. JA 356-57, 360-61. At both meetings, the PBGC pressed LTV for additional information bearing on the effect of restoration on interested parties. *Id.* LTV speculated that restoration could jeopardize an impending contract with Honda of America; that the steel industry was very sensitive to upset; that a strike could cost the company $100 million a month; and that the company could owe as

much as $300 million in past due contributions if the plans were restored, for which it would be hard-pressed to come up with collateral for pension funding waivers. JA 357, 360. LTV then indicated that the effect of restoration would be unclear. JA 360. It did not, however, offer any details to support these claims or ask for additional time to submit any. JA 356.

In view of all the above, LTV cannot seriously claim that it was surprised when the PBGC restored the Plans on September 22, 1987. Nor can LTV claim that it was surprised by the reasons given for the restoration, or that it was prejudiced by the PBGC's procedures.

Moreover, PBGC had a pressing need for prompt action in this case, both to correct LTV's abuse of the pension insurance program and to prevent other companies from following LTV's example.[29] LTV first informed PBGC of the proposed follow-on plans in May, sought and obtained bankruptcy court approval to fund them in July, and implemented them in August. To require more elaborate procedures in circumstances such as these would unduly restrict PBGC's restoration authority.

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[29] Prompt action was also in LTV's interest. Once its Plans were restored to their "pretermination" status pursuant to section 4047, the follow-on payments were unnecessary. Amounts already paid, however, would likely have been unrecoverable.

CONCLUSION

The decision of the court of appeals should be reversed and PBGC's restoration of the Plans should be enforced.

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